

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

R&R POOL AND PATIO, INC. d/b/a PATIO.COM

Employer ¹

and

LOCAL 371, UNITED FOOD AND COMMERCIAL
WORKERS UNION, AFL-CIO, CLC

Petitioner

Case No. 34-RC-2082

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, I find that: the hearing officer's rulings are free from prejudicial error and are affirmed; the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction; the labor organization involved claims to represent certain employees of the Employer; and a question affecting commerce exists concerning the representation of certain employees of the Employer.

The Petitioner seeks to represent a unit of approximately 30 full-time and regular part-time warehouse and office clerical employees employed by the Employer at its 74 Largo Drive, Stamford, Connecticut facility (herein called the Stamford facility). The Employer contends that a unit limited to the warehouse and office clerical employees at the Stamford facility is not appropriate for the purposes of collective bargaining, and that the only appropriate unit must include all of its Connecticut-based employees, including approximately three clerical employees assigned to a business office located at 40 East

¹ The name of the Employer appears as amended at the hearing.

Putnam Avenue in Greenwich, Connecticut (herein called the Greenwich business office), one employee assigned to the retail outlet located at the Stamford facility, known as the showroom, and approximately 17 employees assigned to its remaining four Connecticut-based retail facilities. In this regard, the Employer maintains that it has rebutted the Board's presumption favoring single facility units. The Employer further contends, contrary to the Petitioner, that approximately 30 temporary employees should also be included in the petitioned-for unit. For the reasons noted below, I reject the Employer's contention that the smallest appropriate unit must include all other employees, including those employed by the Employer at its Greenwich business office, its five Connecticut-based retail facilities, and all temporary employees.

I Overall Operations

A. Overview

The Employer, a Connecticut corporation, is engaged in the wholesale and retail sale of outdoor patio furniture, billiard tables, and related recreational accessory products for the home. It maintains its principal office at the Stamford facility, a two-story 86,000 square foot building that is subdivided into three sections: the 5,000 square foot retail showroom area on the first floor; a large warehouse area on the remaining portion of the first floor; and administrative offices on a second story balcony level known as the mezzanine, so named because it hangs over and looks down on the first floor. In addition to the showroom at the Stamford facility, the Employer maintains four other retail-only locations in Connecticut, one each in the following towns: Greenwich, New Canaan, Ridgefield and Westport (herein collectively referred to, including the Stamford showroom, as the Connecticut retail outlets).² The Employer additionally maintains the small and stand-alone Greenwich business office.

As discussed in greater detail below, the Employer primarily sells its products directly to the public at its Connecticut retail outlets. After a product is sold, an employee from the involved retail outlet submits an invoice order to the office clericals at the Stamford facility. Warehouse employees pull the product stored within the warehouse, prepare it for delivery, and deliver it to the customer.

² The Employer also operates the following eight other retail outlets that are not located in Connecticut: four in New York and one each in Maryland, Massachusetts, Pennsylvania, and Virginia. Neither party seeks the inclusion of the employees at these eight facilities.

B. Supervisory Structure

The Employer is equally co-owned and managed by three brothers, David Ross, Mitchell Ross and Phil Ross, each of who serves as co-chief operating officers. They are primarily responsible for the Employer's operations, and each maintains an office on the mezzanine level at the Stamford facility. Although each of the Ross brothers spends the greatest portion of his respective time at the Stamford facility, each also independently rotates amongst the remaining five Connecticut facilities, and also spends a lesser, undefined amount of time at the out-of-state retail facilities. Thus, on any given day, one of the Ross brothers is working at and overseeing the operations of the Stamford facility, while the other two brothers separately spend the day and oversee the operations at two of its other facilities. The Ross brothers are also responsible for all personnel-related decisions, such as annual evaluations, hiring, firing, and disciplining, although as noted below, they each regularly follow the recommendations of several Stamford-based supervisors in making such decisions.

Reporting to the Ross brothers are Vice President of Operations Alexandria Scott, Warehouse Manager Dave Incerto, and Controller Steve Rubin, all of who are based at the Stamford facility. Incerto oversees the entire Stamford warehouse operation and supervises all warehouse employees, including truck drivers, order pickers, wrappers, and assemblers. Included in his responsibilities is the authority to effectively recommend the hiring, firing, or disciplining of such employees. Rubin is responsible for all financial dealings, including oversight of the purchasing, accounts payable and advertising functions. Rubin is also responsible for hiring temporary employees. The record does not reveal Scott's function or duties. However, it does indicate that she has authority to recommend the hiring, firing or disciplining of employees.

C. Job Classifications

1. Petitioned-For Employees

a. Warehouse Employees

There are approximately thirty to forty warehouse employees, including six to ten truck drivers, assigned to the Stamford facility's warehouse. In this regard, the Stamford facility serves as the storage facility for inventory for all of the Employer's retail

outlets. With the exception of truck drivers, all remaining warehouse employees are responsible for unloading and storing incoming product from vendors, and after such product is sold, preparing it for delivery. In this regard, they use forklifts, tow motors, hand trucks, and pallet lifters to first pull the order and then assemble and wrap the ordered product in various designated areas on the warehouse floor. They also maintain the order and cleanliness of the warehouse. Every morning, truck drivers and their helpers, known as navigators, load purchased items into one of the Employer's ten 24-foot delivery trucks, all of which are stationed at the Stamford facility, and then spend the remainder of the day delivering product directly to customers' homes. About two to three times a week, they deliver inventory to, or pick up sold floor models from, one of the Employer's five retail outlets. Less frequently, they also deliver to, or pick up product from, the Employer's out-of-state locations. After completing their deliveries, drivers return to the Stamford facility where they park their trucks overnight.

b. Office Clerical Employees

There are approximately ten to twenty office clerical employees assigned to the Stamford facility, all of who work in either cubicles or offices on the mezzanine level. They are collectively responsible for, *inter alia*, various clerical functions including switchboard, inventory control, purchasing and customer service functions. With regard to purchasing, several designated office clericals perform some role in this function, such as contacting vendors to locate, purchase, and issue payment for products. With regard to customer service functions, several designated office clericals telephonically assist customers by, for example, confirming delivery dates, answering questions regarding the status of their order, addressing issues related to delayed or defective products, and conducting post-delivery status checks to confirm customer satisfaction. At least one office clerical employee, purchasing manager Susan Thompson, is responsible for all payroll related functions for employees at the Stamford facility. Another office clerical employee is responsible for mailing catalogs to the public. In performing their duties described above, office clerical employees remain in regular contact with warehouse employees, particularly with regard to locating product within the warehouse, delivery locations and schedules, and addressing customer questions.

2. Additional Positions Sought By Employer

a. Office Clericals at the Greenwich Business Office

The Employer employs five clerical employees at its Greenwich business office located approximately 5 miles away from the Stamford facility. During the hearing, the parties stipulated that two of these five employees, Vice President of Finance Karen Martinelli and Elysa Gillian, are confidential employees and should be excluded from the bargaining unit. The remaining three employees, Elysabeth Martinelli, Erika Thompson, and Sheila Turner, all report directly to whichever Ross brother is present at their facility for the day, and all perform a number of clerical functions, including unspecified tasks related to customer service, record keeping, bookkeeping, accounts payable, credit, purchasing, and payroll functions. The record does not reveal the work hours of these three employees. However, it does reveal that one of the Greenwich-based office clerical employees, Erika Thompson, works three days a week at the Greenwich business office and spends the other two days per week at the Stamford facility working alongside petitioned-for employees on the mezzanine level.

b. Employees at the Retail Outlets

As noted above, the Employer employs a total of approximately 18 employees at its five retail outlets: one employee at the Stamford showroom, and 17 employees at the remaining four retail outlets.

1) The Showroom at the Stamford Facility

The retail showroom at the Stamford facility has a front entry for the public and two product display areas, the first a 5,000 square foot area immediately adjacent to the entryway, known as the “pen”, where patio tables are displayed, and the second, an interior area of equal size where the Employer’s remaining products are displayed. The interior display area is separated from the warehouse operations by a series of storage racks that allows a blocked view into the warehouse. There is an opening between these storage racks that also permits unimpeded entry into the warehouse. The Employer employs one individual, Mark Malone, at its Stamford showroom. Malone serves as the primary salesman at that outlet. As necessary, either to cover for Malone’s absences or to meet increased public demand, the Employer also assigns salespersons from the other four retail outlets or other Stamford-based employees to

work within the showroom, primarily Scott Schoenhaus, who ordinarily works on the mezzanine section and is responsible for the Employer's internet-based sales. The record does not reveal the frequency with which any of these individuals work in the showroom.

2) The Greenwich, New Canaan, Ridgefield, and
 Westport Retail Outlets

The remaining four retail facilities, located between three and twelve miles from the Stamford facility, are each staffed with several sales personnel and at least one non-salesperson. In this regard, the Employer employs four salespersons and two non-salespersons at its Greenwich store; two sales persons and one non-salesperson at its New Canaan store; two salespersons and one non-salesperson at its Ridgefield store; and four salespersons and one non-salesperson at its Westport store. None of the stores has a designated store manager. However, the record clearly indicates that certain salespersons have authority to direct the daily duties of the remaining store personnel, particularly those of the non-salesperson. Moreover, as previously indicated, all retail outlet operations are directly supervised by the Ross brothers.

Each store is comprised of a larger retail display area where the public enters and views floor models, and a smaller back area where certain smaller products, such as table umbrellas, are stocked. Apart from one or two pallet-lifters located at the Greenwich retail location, the Employer does not maintain or utilize forklifts, tow lifters, hand trucks, or pallet lifters at its retail outlets.

Salespersons predominantly sell to customers who visit the store, and telephonically assist other customers with product or delivery information. To a far lesser extent, sales personnel perform minor furniture assembly, such as erecting an umbrella for a patio table; assist the non-salesperson in relocating furniture within the store; and, as necessary, use their personal vehicle to deliver small items to a customer's home. It appears that salespersons each have a key to their respective store location.

Non-salespersons at the above store locations are not involved in selling to customers. Instead, they perform a variety of physical tasks such as cleaning the store, arranging displays, relocating furniture within the store, performing minor furniture

repairs, assembling and disassembling less complicated furniture (such as patio tables), retrieving certain stored products located in the outdoor sheds found at each location, and, as necessary, assisting drivers to unload newly arrived product from the Stamford warehouse. Some also answer phones and make bank deposits. On what appears to be infrequent occasions, most non-salespersons also use their personal vehicle to deliver a small item to a customer's house or to retrieve stock from the Stamford warehouse.³

D. General Terms and Conditions of Employment

All of the petitioned-for employees work Monday through Friday from 9 a.m. to 5 p.m. with a half-hour lunch and are paid hourly. Although they receive the minimum wage to start, those identified in the record generally receive between \$7.00 and \$11.00 per hour. The record does not disclose any wage differential that may exist between warehouse employees and office clerical employees. The record does reveal that most, if not all, of the Employer's employees, regardless of location, are eligible for performance-related bonuses. All employees upon hire are provided with an employee handbook that specifies the benefits employees are eligible to receive, including but not limited to holidays, vacation, disability, sick leave and overtime pay. This handbook also applies to the Employer's employees at its out-of-state locations. The employee handbook instructs employees to discuss all work-related issues with their immediate supervisor first. Only after such front-line meetings have occurred may employees "request a meeting with David M. Ross, Mitchell J. Ross, or Philip S. Ross" if they still have questions or seek further clarification. The handbook also indicates that supervisors will review job progress, set performance plans, discuss transfer opportunities, and authorize overtime. The handbook further specifies that employees need to seek the approval of their immediate supervisor before they will be granted vacation days and to make arrangements for jury duty.

The Greenwich business office operates from 9 a.m. to 6 p.m., Monday through Friday. However, the record does not disclose the specific hours worked, the rates of

³ One of these non-salespersons, Cesar Servan, who works at the Greenwich retail outlet, drives the Employer's pick-up truck assigned to the Greenwich retail outlet about two to three times weekly to either retrieve inventory from the Stamford warehouse or to deliver product to a customer's home.

pay, or method of compensation earned by office clerical employees at the Greenwich business office.

All retail outlets, including the showroom at the Stamford facility, are open from 9 a.m. to 6 p.m., seven days a week. The employees at these retail outlets work either 40 or 48 hours per week. As discussed above, the Employer employs salespersons at each retail outlet and non-salespersons at all but the Stamford showroom. Each salesperson has an individual written agreement with the Employer pursuant to which each is either paid an hourly rate or a salary. In addition, salespersons receive a 1% to 3% commission rate based on the amount of product sold.⁴ Non-salespersons are generally paid hourly. However, at least one non-salesperson at the Greenwich retail outlet, Cesar Servan, sells product directly to the public during the Christmas season and also earns commission of up to 3% in addition to his hourly rate.

All Stamford-based employees, including the showroom salesperson, record their time by using a hand scanner that is activated after an employee punches in a personalized four-digit code. Employees at the remaining four retail outlets and the Greenwich business office record their time by entering their individual code into a computer stationed at each respective location.

Employees in the petitioned-for unit, as well as the clerical employees at the Greenwich business office, do not work on the weekend or on about 11 annually scheduled holidays. Further, the warehouse and mezzanine portions of the Stamford facility shut down for between one and two weeks during the Christmas holiday season. Employees in the petitioned-for unit are not paid during these holidays or shutdown periods, except as described below. The record does not disclose whether the Greenwich business office also shuts down during that period. In contrast to those two locations, the Stamford showroom and the four other retail outlets remain open during the above holidays, with the exception of New Year's Day, Thanksgiving, and Christmas, and do not shut down during the Christmas season. During holidays and the shutdown period, the Employer offers the petitioned-for employees the opportunity to

⁴ As more fully discussed below, I shall grant the Petitioner's motion and draw an adverse inference from the Employer's refusal to comply with the Petitioner's subpoena seeking all employment agreements between the Employer and its salespersons, as well as records disclosing the salespersons' earnings.

work at one of its retail outlets, albeit in a non-sales function, rather than having an unpaid day off. The record discloses that only some of the petitioned-for employees have ever taken advantage of this opportunity, and even when doing so, for no more than a day or two annually.

According to the Employer's employee handbook, hourly paid employees, such as the employees in the petitioned-for unit, must have vacations approved farther in advance, and receive considerably fewer vacation days, than salaried employees, such as salespersons. In this regard, hourly paid employees are not eligible to receive vacation days during their first year of employment. They receive five days in their second year, plus one additional vacation day for each additional year up to a maximum of eight days after six years of uninterrupted service. All vacation requests by hourly paid employees must be submitted to their immediate supervisor at least three months in advance of the dates requested. In contrast, salaried employees receive five vacation days during their first year of employment, and ten days during their second year of service, up to a maximum of 15 vacation days after six years of uninterrupted service. Salaried employees must make their vacation requests to their immediate supervisor at least one month in advance of the requested dates.

As noted above, the Ross brothers and Warehouse Manager Incerto make all decisions and/or effective recommendations with regard to hiring, firing, and wage increases for the warehouse employees. Beyond the Ross brothers, the record does not disclose who else, if anyone, makes these personnel-related decisions for the Employer's remaining complement of employees. The Employer also issues a monthly newsletter to all employees, which announces, *inter alia*, any employment vacancies throughout its Connecticut facilities.

There is a lunchroom located within the warehouse portion of the Stamford facility, which may be utilized by employees in the petitioned-for unit as well as the salesperson in the showroom.

There is no history of collective bargaining at any of the Employer's locations in Connecticut.

E. Employee Contact and Interchange

1. Contacts and Interchange Between Office Clericals at the Greenwich Business Office and the Petitioned-for Employees

There is no evidence that any of the office clerical employees at the Greenwich business office have any interaction with the warehouse employees at the Stamford facility. However, there is conflicting evidence regarding the amount of contact between office clerical employees assigned to the Greenwich business office and office clerical employees in the petitioned-for unit at the Stamford facility. In this regard, without providing any specific examples, co-owner David Ross generally testified that the Greenwich-based office clerical employees perform the same tasks as, and interact with, the Stamford-based office clerical employees “all the time.” In contrast, Stamford-based office clerical employee Chanel George testified that the Stamford-based office clerical employees have “almost no contact” with the office clerical employees in the Greenwich business office. However, as previously noted, the record shows that one of the three office clerical employees at the Greenwich business office, Erika Thompson, works three days a week at the Greenwich business office and spends the other two days per week at the Stamford facility. According to Ross, another office clerical employee at the Greenwich business office, Sheila Turner, works at the Stamford facility “once” every other month. Finally, there is no evidence that any employees have permanently transferred between the Stamford facility and the Greenwich business office.

2. Contacts and Interchange Between Retail Outlet Employees and the Petitioned-for Employees

According to Petitioner’s witness Chanel George, she is one of three office clerical employees at the Stamford facility who maintains daily contact with retail outlet personnel. In this regard, George testified that she speaks frequently throughout the day to retail outlet employees about inventory issues and sales orders. George also identified two other office clerical employees, Yolanda Lee and Gregory Whitlock, who spend an undefined portion of their time communicating with retail outlet employees about certain issues, such as special orders and inventory. However, beyond these

limited descriptions, there is no evidence regarding any other work-related contact between office clerical employees at the Stamford facility and retail outlet employees. There is also no evidence that office clerical employees from the Stamford facility regularly work at any of the retail outlets⁵ or that retail outlet employees have ever worked with office clerical employees on the mezzanine level at the Stamford facility. Moreover, there is no evidence that office clerical employees from the Stamford facility have ever permanently transferred to any of the retail outlets, or that retail outlet employees have permanently transferred to the Stamford facility to work as office clerical employees.

With regard to warehouse employees, other than drivers, the record discloses that they ordinarily do not visit the four non-Stamford-based retail outlets or otherwise have any work-related contact with the employees at those outlets. On occasion, perhaps as infrequently as two to three times every six months, one or two warehouse employees may be assigned to one of those four retail outlets for up to two or three hours per day in order to assemble and/or repair pool tables and other products at that outlet. On an undefined number of these occasions, one of the salespersons at the retail outlet may provide some limited assistance. Conversely, apart from the salesperson at the Stamford showroom, salespersons at the other four retail outlets generally visit the Stamford facility only for the following two reasons: 1) sales meetings held once or twice monthly; and 2) a twice-yearly, two-day warehouse sale held within the warehouse at the Stamford facility. With regard to sales meetings, there is no evidence regarding where within the Stamford facility such meetings are held. Further, during these occasions, the record discloses only incidental contact between visiting salespersons and the petitioned-for employees. With regard to warehouse sales, the Employer assigns five or six salespersons from any of the five retail outlets to partake in a warehouse sale open to the public. Although these two-day warehouse sales are held within the warehouse, they only occur on the weekends, at a time when the petitioned-for employees are not working. Thus, there is no contact between the visiting salespersons and the petitioned-for employees during warehouse sales. With regard to

⁵ As noted above, during those holidays when the Stamford facility is closed, a few office clerical employees have annually worked a maximum of one or two days at a retail outlet.

the Stamford showroom, warehouse employees are responsible for setting up the outside display area in the pen and, on occasion, may go into the showroom to disassemble a sold floor model.

Because drivers customarily deliver product directly from the warehouse to a customer's house, they do not have extensive work-related contact with retail outlet employees. However, the record does disclose that about two or three times per week, drivers may spend about 20 minutes at any one of the retail outlets, either picking up or delivering product to that outlet. The record does not specify the degree of work-related contact between the driver and retail outlet employees during those occasions, although it appears that retail outlet employees may on some, but not all, occasions assist the driver in some manner.

There is vague and unspecific evidence regarding whether any retail outlet employee has ever transferred to the Stamford facility to work as a warehouse employee. In this regard, Ross generally identified three employees who he believed were at one time assigned to the retail outlets but who currently work as a warehouse employee at the Stamford facility. However, with regard to these three employees, Ross was unable to specifically identify when or why such transfers occurred. The record also discloses that in 2003, one employee, Kenneth Redford, was promoted from warehouse employee at the Stamford facility to salesperson at the Greenwich retail outlet.

F. Temporary Employees

Due to the seasonal nature of the employer's business, the Employer experiences spikes in its work flow, typically from spring through the end of summer, which requires it to annually hire temporary employees from employment agencies. In this regard, for at least the past five years, the Employer claims that it annually selects one employment agency, based on price and other factors, to exclusively supply the Employer with temporary employees during that year's busy season. Thus, in 2003, the Employer contracted with a staffing agency named the Monroe Group. In 2004, the Employer contracted with another staffing agency, Seque Staffing, which began

supplying temporary employees to the Employer since April 28, 2004, the start of the Employer's busy season.⁶

The Employer does not seek to hire temporary employees who have any special skills, training, or education. Rather, it relies on the employment agency to interview, screen, and perform all background references on interested candidates. Once the employment agency refers a temporary employee to the Employer, the agency assumes responsibility for all FICA, state and federal unemployment taxes, and worker's compensation payments on behalf of that temporary employee. According to the agreement between the Employer and Seque, the Employer pays Seque an hourly rate of \$9.44 for each hour worked by a Seque-supplied temporary employee. Although somewhat unclear, it appears that Seque receives a third of this fee for itself and pays the remainder as a wage to the temporary employee. During their employment with the Employer, temporary employees must adhere to the Employer's work rules, including the attendance policy. However, temporary employees are not eligible to receive fringe benefits offered to the Employer's regular employees, such as health insurance, vacation, personal and sick days, bereavement leave, bonuses and profit sharing.

With the exception of one or two temporary employees who have been assigned to the retail outlets, temporary employees are generally assigned to the Stamford facility where they report to Warehouse Manager Incerto and work side-by-side with, and perform many of the same tasks performed by the employees in the petitioned-for unit. Specifically, temporary employees are assigned to unload vendor trucks, load the Employer's delivery trucks, and perform all remaining warehouse functions, such as pulling orders and assembling and wrapping furniture in preparation for delivery. Some also serve as the drivers' helpers during deliveries, while others perform certain office clerical duties such as answering phones and filing paperwork. Temporary employees do not use the hand scanner at the Stamford facility to record their time. Rather, they must use a time clock located on the outside of the facility.

Although the Employer claimed that temporary employees are hired for an indefinite duration, the record does not support that contention. In this regard,

⁶ Contrary to its claim of exclusivity, the record reflects that in June 2004, the Employer contracted with the Monroe Group, which supplied three temporary employees to the Employer while the instant hearing was in progress.

according to Ross and Controller Rubin, during the peak season the Employer makes daily assessments regarding the need for temporary employees, and contacts Seque as necessary for either less or more manpower. The record reflects that the vast majority of temporary employees supplied by Seque to the Employer in 2004 only worked there for a very limited period. More specifically, between April 28 and June 10, 2004, the Employer employed a total of 30 temporary employees supplied by Seque. Of those 30 temporary employees, 14 worked for the Employer for only one or two days, and another 10 worked for three to ten days. During this same period, only four temporary employees worked in excess of 20 days. Moreover, there is no evidence that the Employer has permanently hired any employees supplied by Seque, or has any intention of doing so. Although Ross testified that the Employer permanently hired some temporary employees in 2003 or earlier, he was unable to identify any specific examples of such permanent hires.

III. Analysis of Conclusion

A. The Appropriateness of a Single-Facility Unit

As noted above, the Employer contends that the only appropriate unit is one that includes all of its Connecticut-based employees. It is well established that when determining the scope of a multi-facility operation, the Board considers a single facility unit to be presumptively appropriate. *Cargill, Inc.*, 336 NLRB 1114 (2001); *J&L Plate, Inc.*, 310 NLRB 429 (1993). The presumption may be overcome, however, by showing a functional integration so substantial as to negate the separate identity of the single-facility unit. *Id.* In deciding that issue, the Board considers such factors as centralized control over daily operations and labor relations, including the extent of local autonomy, skills and functions of the employees, general working conditions, bargaining history, employee interchange, and the geographical location of the facilities in relation to one another. *Id.* For the reasons noted below, I find that the evidence proffered by the Employer in this case is insufficient to overcome the Board's single facility presumption.

1. The Greenwich, New Canaan, Ridgefield, and Westport Retail Outlets

With regard to the similarity of skills and function between employees in the petitioned-for unit and employees at the Greenwich, New Canaan, Ridgefield, and

Westport retail outlets, there is no dispute that none of the employees in the petitioned-for unit either possess, or even utilize, sales skills to perform their regular duties. In contrast, salespersons at these four retail outlets work predominantly in sales and sales-related functions. There is also no dispute that warehouse employees in the petitioned-for unit possess certain physical skills that are either different, or more advanced, than employees at these four retail outlets. In this regard, while retail employees, especially non-salespersons, perform certain physical tasks, only the petitioned-for warehouse employees operate heavy equipment such as forklifts, tow motors, and hand trucks. Similarly, with the possible exception of one non-salesperson (Servan), only warehouse employees wrap, assemble, and disassemble furniture that is more complicated in nature, such as billiard tables. Further, while certain retail employees may use their own vehicle to periodically drive a small item to a customer's house, only warehouse drivers operate the Employer's 24-foot delivery trucks, and safely unload and deliver furniture into a customer's home. Based on the foregoing, I find that warehouse employees possess different skills and perform different work than employees at the above four retail outlets.

With regard to employees' wages, hours and other working conditions, other than the general terms and conditions of employment contained in the employee handbook that apply to all of the Employer's locations, the evidence demonstrates a significant difference between the wages, hours and other working conditions of employees in the petitioned-for unit and employees at the above four retail outlets. In this regard, there is no dispute that employees in the petitioned-for unit are paid on an hourly basis, whereas salespersons, who represent the bulk of the retail outlet employees at issue, receive a salary plus a 1% to 3% commission rate on product sold. Thus, it is apparent that the method in which an employee earns his or her income differs significantly between employees in the petitioned-for unit and salespersons at the above four retail outlets. Moreover, because the Employer refused to comply with the Petitioner's subpoena requesting salespersons' compensation data *and* all employment agreements between the Employer and its salespersons, the record fails to disclose any similarity in income earned between employees in the petitioned-for unit and salespersons at the above four retail outlets. In this regard, it is well established that a party is expected to

produce evidence within its control, such as the wage data and sales agreements at issue in the instant matter, in support of its contentions. *Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972). Accordingly, where, as here, a party insists on withholding evidence, particularly in the face of a valid subpoena requiring its production, it raises an inference that the reason for this non-compliance is based on the fact that the suppressed evidence will be unfavorable to the cause of the suppressing party. *Id.* See also, *National Football League*, 309 NLRB 78, 97-98 (1992). In view of the foregoing, and in light of the Employer's refusal to comply with the Petitioner's valid subpoena for relevant information, I will grant the Petitioner's motion and find an adverse inference that the withheld information would have proven unfavorable to the Employer's contentions.

With regard to non-salespersons at the retail outlets, while they are hourly paid, the record establishes that some non-salespersons also earn a 1% to 3% commission rate on product sold whenever they are afforded the opportunity to work as salespersons.

As previously described, it is also uncontested that employees in the petitioned-for unit and employees at the above four retail outlets work different schedules and hours, and receive different holiday and vacation benefits.

With regard to employee interchange, as previously described, the evidence shows only one confirmed example of a permanent transfer between employees in the petitioned-for unit and the above four retail outlets within the past year. With regard to temporary interchange or contact between employees in the petitioned-for unit and employees at the above four retail outlets, the record demonstrates that such contacts are sporadic and limited in duration. Thus, only two or three office clerical employees at the Stamford facility are identified in the record as having any contact with employees from any of the four above retail outlets. Moreover, testimony concerning two of these employees lacks any context and is of no probative value because there is no evidence of the nature, frequency, duration and degree of such interchange and contact. *Cargill Inc., supra*. Furthermore, many warehouse employees at the Stamford facility never work at any of the four above retail outlets in the course of their regular duties, while

others do so only infrequently. Even during these limited occasions, the evidence does not demonstrate substantial contact between the visiting warehouse employee and these retail outlet employees. Although drivers may spend up to 20 minutes in some of the above four retail outlets on two or three days per week, there is little evidence to show that there is anything beyond incidental contact with retail outlet employees during those occasions. Finally, there is no evidence that employees from the above four retail outlets ever work alongside employees in the petitioned-for unit, even on those limited occasions when retail outlet employees go to the Stamford facility to attend sales meetings or conduct weekend warehouse sales.

With regard to functional integration, the evidence demonstrates that the work performed by employees in the petitioned-for unit is functionally distinct from the work performed by employees at the above four retail outlets. In this regard, these retail outlet employees, as discussed above, are responsible for all retail operations, especially sales and the maintenance of the retail outlet. In contrast, employees in the petitioned-for unit are primarily responsible for warehouse operations, especially physical tasks related to product storage and delivery, and certain administrative tasks, such as mailing catalogs, that are not performed by employees at any of the above four retail outlets.

With regard to centralized control over daily operations and labor relations and the extent of local autonomy, the record establishes that Warehouse Manager Incerto retains and exercises significant and distinct control over warehouse employees but has no such oversight over employees at the four above retail outlets, who are directly supervised by one of the Ross brothers. *Angellus Furniture Mfg. Co.*, 192 NLRB 992 (1971); *Red Lobster*, 300 NLRB 908 (1990). More particularly, although ultimate control with respect to hiring, firing, promotions, transfer and wage increases rest with the Ross brothers who jointly oversee each facility, the record indicates that Incerto plays a significant role in such decisions with regard to warehouse employees. All of the above are indications of significant local autonomy, at least with regard to warehouse employees. With regard to all other Connecticut-based employees, it appears that the Ross brothers are collectively responsible for all aspects of labor relations.

2. The Greenwich Business Office

It appears from the limited facts in the record that office clerical employees at the Greenwich business office possess the same skills, and perform similar work, as office clerical employees in the petitioned-for unit. However, they do not possess the same skills or perform the same work as the warehouse employees.

The record does not specify the manner or amount by which the Employer compensates any of the three office clerical employees at issue in the Greenwich business office. Nor does the record contain any specific evidence regarding the specific hours of work or schedules worked by office clerical employees at the Greenwich business office. Accordingly, there is insufficient evidence to show that these three employees share similar wages, hours, or other general work conditions with employees in the petitioned-for unit.

With regard to employee contact and interchange, apart from the regularity of Greenwich-based clerical employee Erika Thompson's work at the Stamford facility (to be discussed more fully below), there is insufficient evidence that the office clerical employees at the two facilities are in regular contact with each other. In reaching this conclusion, I note that the above-described testimony of co-owner Ross regarding such contact was non-specific in nature, directly contradicted by unit employee Chanel George, and unsupported by any other specific testimony or documentary evidence. Finally, there is no evidence of transfers between employees in the petitioned-for unit and the Greenwich business office.

With regard to functional integration, the evidence regarding the duties of office clerical employees at the Greenwich business office is vague and unspecific. Although, both groups of office clerical employees perform traditional office clerical duties, their duties do not appear to be functionally integrated. In this regard, it appears that Greenwich-based office clericals are more involved in performing general accounting and personnel-related administrative tasks, whereas office clerical employees at the Stamford facility are more involved in performing general customer service-related issues.

3. Conclusion

In light of the above, I find that the Employer has failed to overcome the Board's single-facility presumption, and that the petitioned-for unit is an appropriate unit for the purposes of collective bargaining. However, I find that Greenwich-based office clerical employee Erika Thompson and showroom salesperson Mark Malone share a sufficient community of interest with petitioned-for employees to warrant their inclusion in the unit.

With regard to Thompson, I find that she is a "dual-function" employee because she spends up to 40% of her time working on the mezzanine level at the Stamford facility, where she regularly performs office clerical duties and works side-by-side with other office clerical employees in the petitioned-for unit. *Ansted Center*, 326 NLRB 1208 (1998). With regard to salesperson Malone, the record shows that he shares a lunchroom with, and uses the same hand scanner to record his time, as employees in the petitioned-for unit. In addition, he enjoys unimpeded access between the Stamford showroom and the warehouse where employees in the petitioned-for unit work. Moreover, the record shows that warehouse employees regularly perform physical tasks related to the operation of the showroom, such as assisting Malone to set up or relocate furniture in the exterior and interior display areas of the showroom. Finally, notwithstanding the fact that Malone has functionally different job duties and responsibilities, I note that the exclusion of salesperson Malone would leave him as the only unrepresented statutory employee at the Stamford facility. See, *Victor Industries Corp.*, 215 NLRB 48 (1974); *Felix Half & Brothers, Inc.*, 132 NLRB 1523, 1524 (1961). Accordingly, I shall include employees Thompson and Malone in the petitioned-for unit.

B. Temporary Employees

The test for determining the eligibility of temporary employees is whether they have a continuing and indefinite tenure. *Personal Products Corp.*, 114 NLRB 959, 960 (1955). If the tenure of the disputed individuals is finite and for a set duration, with no substantial expectancy of continued employment, and the individuals are aware of this fact, they are excluded as temporary employees. *Indiana Bottled Gas Co.*, 128 NLRB 1441, fn.4 (1960). For the reasons noted below, I find that the temporary employees do

not share a community of interest with unit employees and are ineligible to vote in the election directed herein.

The record conclusively establishes that temporary employees at issue in this case are hired for a defined period, i.e. the Employer's busy season that begins in the spring and continues through the summer. The record also conclusively establishes that the great majority of temporary employees only work for the Employer for a period of nominal duration. As previously described, of the 30 temporary employees supplied by Seque to the Employer since April 28, 2004, 24 worked for fewer than ten days, of which 14 worked only for one or two days. Moreover, the Employer failed to present any evidence to establish that it ever calls back any temporary employees from year to year. *LaRonde Bar & Restaurant, Inc.*, 145 NLRB 270, fn.6 (1963). Finally, I note that temporary employees are interviewed and hired by an independent contracting agency and do not receive the same benefits as the Employer's regular employees. Based upon the foregoing, I find that temporary employees do not share a community of interest with unit employees and are ineligible to vote in the election directed herein.⁷

Accordingly, based upon the above and the record as a whole, I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees employed by the Employer at its 74 Largo Drive, Stamford, Connecticut facility, including warehouse, office clerical, and showroom employees; but excluding guards, professional employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate herein at the time and place set forth in the notices of election to be issued subsequently.

⁷ In view of my determination to exclude temporary employees, I find it unnecessary to address the issue raised by both parties in their post-hearing briefs regarding whether under the Board's ruling in *M.B. Sturgis, Inc.* 331 NLRB 1298 (2000), such employees are jointly employed by the Employer and the employment agency that supplied them.

Eligible to vote: those employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were in the military services of the United States, ill, on vacation, or temporarily laid off; and employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements.

Ineligible to vote: employees who have quit or been discharged for cause since the designated payroll period; employees engaged in a strike who have been discharged for cause since the strike's commencement and who have not been rehired or reinstated before the election date; and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

The eligible employees shall vote whether or not they desire to be represented for collective bargaining purposes by the Local 371, United Food and Commercial Workers Union, AFL-CIO, CLC.

To ensure that all eligible employees have the opportunity to be informed of the issues in the exercise of their statutory rights to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision and Direction of Election, the Employer shall file with the undersigned, an eligibility list containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional office, 280 Trumbull Street, 280 Trumbull Street, 21st Floor, Hartford, Connecticut 06103, on or before July 19, 2004. No extension of time to file these lists shall be granted except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by July 26, 2004.

Dated at Hartford, Connecticut this 12th day of July, 2004.

/s/ Peter B. Hoffman
Peter B. Hoffman, Regional Director
National Labor Relations Board
Region 34